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In The

Supreme Court of the United States

October Term, 1993

PANAMA CITY MEDICAL DIAGNOSTICS, LTD., DR. FRANK SYFRETT and DR. STEVE TAYLOR,

Petitioners,

v.

GEORGE STUART, in his official capacity as Secretary of Florida Department of Professional Regulation; DOUGLAS COOK, in his official capacity as Director of the Agency for Health Care Administration; and CITIZENS OF THE STATE OF FLORIDA,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did either of the 1993 United States Supreme Court decisions of *F.C.C. v. Beach Communications, Inc.*, 113 S.Ct. 2096 (1993), or *Heller v. Doe*, 113 S.Ct. 2637 (1993), modify the 1992 United States Supreme Court decision of *Nordlinger v. Hahn*, 112 S.Ct. 2326 (1992), by eliminating the requirement that a statute's rationale must conceivably or reasonably have been the purpose or policy of the legislature?

PARTIES TO THE PROCEEDING IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

A. *Petitioners (Plaintiffs and appellees below)*

Panama City Medical Diagnostics, Ltd.

Dr. Frank Syfrett

Dr. Steve Taylor

B. *Respondents (Defendants and appellants below)*

George Stuart, in his official capacity as Secretary of Florida Department of Professional Regulation

Douglas Cook, in his official capacity as Director of the Agency for Health Care Administration

Citizens of the State of Florida

C. *Other Parties (Intervenors – plaintiffs and appellees below)*

Am-Med Associates, a Florida General Partnership

Winter Park MRI Partners, Ltd.

Medi-Tek Winter Park, Inc.[1]

MRI of Wellington, Ltd.

Meditek-Wellington, Inc.[2]

Meditek-Palm Beach Gardens, Inc.[3]

---

[1] Not aware of any parent company or non-wholly owned subsidiaries.

[2] Not aware of any parent company or non-wholly owned subsidiaries.

[3] Not aware of any parent company or non-wholly owned subsidiaries.

PARTIES TO THE PROCEEDING IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT – Continued

Clay Medco, d/b/a Orange Park Diagnostic Center

Prime Care Diagnostic, Inc.[4], d/b/a Prime Care Diagnostics Center

Magnedocs, Ltd., a Florida Limited Partnership, by and through its general partner, Magnadoc, Inc.[5]

Magwest, Ltd., a Florida Limited Partnership, by and through its general partner, Westdoc, Inc.[6]

Kendall Therapy Center, Ltd., by and through its general partner, CHC of South Miami, Inc.[7]

Medical Park Diagnostic Multicenter, d/b/a Medical Park, by and through its general partner, CHC of South Miami, Inc.[8]

Kendall Medical Enterprises, Inc.[9], d/b/a Kendall Diagnostic Center

Health Images, Inc.[10]

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[4] Not aware of any parent company or non-wholly owned subsidiaries.

[5] Not aware of any parent company or non-wholly owned subsidiaries.

[6] Not aware of any parent company or non-wholly owned subsidiaries.

[7] Not aware of any parent company or non-wholly owned subsidiaries.

[8] Not aware of any parent company or non-wholly owned subsidiaries.

[9] Not aware of any parent company or non-wholly owned subsidiaries.

[10] Not aware of any parent company or non-wholly owned subsidiaries.

PARTIES TO THE PROCEEDING IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT – Continued

Robert Kagan, M.D.

Magnetic Imaging Systems I, Ltd., by and through its general partner, Nuclear Magnetic Imaging, Inc.[11]

CHC of South Miami, Inc.[12]

(Defendants below – dismissed)

Robert B. Williams, in his official capacity as Secretary of Florida Department of Health and Rehabilitative Services

Board of Medicine

Board of Osteopathic Medical Examiners

Board of Chiropractic

Board of Podiatric Medicine

Board of Optometry

Board of Dentistry

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[11] Not aware of any parent company or non-wholly owned subsidiaries.

[12] Not aware of any parent company or any non-wholly owned subsidiaries other than those previously listed.

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No. _____

In The

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October Term, 1993

PANAMA CITY MEDICAL DIAGNOSTICS, LTD., DR. FRANK SYFRETT and DR. STEVE TAYLOR,

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v.

GEORGE STUART, in his official capacity as Secretary of Florida Department of Professional Regulation; DOUGLAS COOK, in his official capacity as Director of the Agency for Health Care Administration; and CITIZENS OF THE STATE OF FLORIDA,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

On July 21, 1992, the United States District Court for the Northern District of Florida entered a written decision finding Section 16 of Chapter 92-178 of the Laws of Florida unconstitutional. (Appendix A). On February 15, 1994, the United States Court of Appeals for the Eleventh Circuit reversed the trial court's decision in a published opinion, *Panama City Medical Diagnostics, Ltd. v. Williams,*

13 F.3d 1541 (11th Cir. 1994). (Appendix B). On April 29, 1994, the Eleventh Circuit denied petitioners', Panama City Medical Diagnostics, Ltd., Dr. Frank Syfrett and Dr. Steve Taylor ("Panama City Medical Diagnostics"), Petition for Rehearing and Suggestion for Rehearing En Banc. (Appendix C). On June 3, 1994, the Eleventh Circuit stayed issuance of mandate pending a petition for writ of certiorari to this Court. (Appendix D).

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) to review the final decision of the United States Court of Appeals for the Eleventh Circuit on petition for writ of certiorari.

STATUTORY PROVISION INVOLVED

Section 16 of the Patient Self-Referral Act of 1992, Chapter 92-178, Laws of Florida, codified at section 455.2555 of the Florida Statutes (1993), provides:

> Effective July 1, 1992, a fee schedule is imposed on all providers of designated health services. The fee schedule shall apply to all persons who receive such services who are not eligible for benefits under Title XVIII or Title XIX of the Social Security Act, and shall be limited to no more than 115 percent of the Medicare limiting charge for nonparticipating physicians for such services, including technical and professional components, as determined by the Secretary of

the United States Department of Health and Human Services. The professional and technical charges for such procedures shall be increased or decreased for each year thereafter on an annual basis in accordance with the percentage adjustments made by the Medicare program for these procedures for nonparticipating physicians. Any person who charges more than the fees authorized by this section shall be subject to an administrative fine not to exceed $5,000 per violation, to be fixed, imposed, and collected by the appropriate licensing board. The application of this provision shall not apply to group practices as defined in this act or hospitals licensed pursuant to chapter 395.

STATEMENT OF THE CASE

In June 1992, Panama City Medical Diagnostics brought suit in the United States District Court for the Northern District of Florida challenging Section 16 of the Patient Self-Referral Act of 1992 ("Patient Self-Referral Act"), Chapter 92-178, Laws of Florida, as violative of the Equal Protection and Due Process clauses of the United States Constitution. Panama City Medical Diagnostics sought an injunction to prohibit enforcement of Section 16 of the Patient Self-Referral Act which set fee caps for certain diagnostic services by limiting fees for such services to no more than 115% of the Medicare limiting charge for non-participating physicians for such services, including technical and professional components. This schedule applied regardless of whether or not the patient referral was from a health care provider who had an investment interest in the entity offering the designated

service. Section 16 exempted hospitals and group practices from the fee caps. A study completed after the legislation was passed indicated that providers subject to the fee caps would probably be put out of business. *Panama City Medical Diagnostics, Ltd. v. Williams*, 13 F.3d 1541, 1544 (11th Cir. 1994).

The district court conducted a hearing for an injunction at which time the equal protection issue was fully considered. Subsequently, the district court granted a permanent injunction enjoining enforcement of Section 16 of the Patient Self-Referral Act of 1992. (Appendix A). The defendants appealed and on February 15, 1994 a panel of the United States Court of Appeals for the Eleventh Circuit reversed. *Panama City*, at 1547. (Appendix B). On April 29, 1994, the Eleventh Circuit denied rehearing and suggestion for rehearing en banc. (Appendix C). Finally, on June 3, 1994, the Eleventh Circuit stayed issuance of mandate pending petition to this Court. (Appendix D).

Central to this reversal was the Eleventh Circuit's belief that the district court did not correctly perform a rational basis analysis of the purpose for the two exceptions to the Section 16 fee schedule. Although the district court used the rational basis standard articulated by the United States Supreme Court in *Nordlinger v. Hahn*, 112 S.Ct. 2326 (1992), the Eleventh Circuit stated that the district court did not have benefit of the 1993 Supreme Court opinions of *Heller v. Doe by Doe*, 113 S.Ct. 2637 (1993) and *F.C.C. v. Beach Communications, Inc.*, 113 S.Ct. 2096 (1993). *Panama City*, at 1547 n.4. The Eleventh Circuit also criticized the district court for having considered the

actual motivation of the Florida Legislature and the passage of the Patient Self-Referral Act. *Id.* at 1546.

FEDERAL JURISDICTION IN THE TRIAL COURT

The trial court, the United States District for the Northern District of Florida, had federal question jurisdiction, pursuant to 28 U.S.C. § 1331, over the equal protection claim brought under the United States Constitution.

ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

The Eleventh Circuit specifically found "that the district court erred both in searching for the actual motivation of the legislation, and confining its analysis to the facts on the record." *Panama City* at 1546. This Court has never suggested that it is improper for a trial court in reviewing the constitutionality of legislation to search for the actual motivation of its passage. The Eleventh Circuit's opinion overturns one of the most fundamental precepts of constitutional law in so doing. Petitioners readily admit that a trial court should not confine its inquiry into only the plain language and written legislative history of the statute at issue, but that does not preclude review of the actual motivation for enacting the statute.

Apparently, the Eleventh Circuit came to its conclusion that a trial court should not search for the actual

motivation of passage of legislation based upon its erroneous view that the *Beach Communications* and *Heller* decisions somehow modified the long standing equal protection analysis set forth in *Nordlinger*. Neither of those former cases in any way suggests that it is improper for a trial court to search for the actual motivation of the challenged statute.

In addition, the district court did not confine its equal protection analysis to actual motivation of the Florida Legislature, nor did it confine its analysis to the facts on the record. Instead, the district court applied the equal protection analysis set forth in *Nordlinger*, a decision of this Court rendered approximately one month before the district court entered its preliminary injunction.

The district court record reveals that Judge Stafford searched not only the legislative history of the Patient Self-Referral Act but allowed the respondents ample opportunity to present any conceivable rational basis for Section 16. The record also reveals that the district court at both the hearing and in its order was well aware of the holding of *Nordlinger*, as evidenced by its citation as the appropriate standard of review of the constitutionality of Section 16 of the Patient Self-Referral Act.

This Court in *Nordlinger*, a tax case, held that the appropriate standard of rational basis review:

> is whether the difference in treatment between newer and older owners rationally furthers a legitimate state interest. In general, the Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification, ... the legislative facts on which the classification is apparently based rationally may have

> been considered to be true by the governmental decisionmaker, ... and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.

Nordlinger, 112 S.Ct. at 2332 [other citations omitted]. Such a standard would be "especially deferential in the context of classifications made by complex tax law." *Id.*

In addition, the Court in *Nordlinger* recognized that "the Equal Protection clause does not demand for purposes of rational basis review that a legislature or governing decisionmaker actually articulate at any time the purpose or rational support in its classification." *Id.* at 2334. But then the Court went on to find, *"[n]evertheless, this Court's review does require that a purpose may conceivably or 'may reasonably have been the purpose and policy' of the relevant governmental decisionmaker." Id.* (emphasis added). It is important that *Nordlinger* was decided in the context of reviewing an equal protection challenge to a tax classification, a situation in which the courts grant the greatest deference to a legislature.

All of the above quotations and standards were cited by Judge Stafford in his July 21, 1992 order permanently enjoining Section 16 of the Patient Self-Referral Act. (Appendix A). Again, *Nordlinger* was decided on June 18, 1992, approximately one month prior to Judge Stafford's decision enjoining Section 16.

The district court applied *Nordlinger* and allowed the respondents to argue whatever rational basis they could come up with regardless of whether or not they were actually supported by the legislative history behind Section 16 of the Patient Self-Referral Act. In fact, as

described more fully below, all of the rational bases suggested by the respondents were not based upon any particular finding in the legislative history. This is because, as the Eleventh Circuit has recognized, Section 16 was passed with little discussion and was afforded only cursory treatment by the Florida legislature. To use the words of the Eleventh Circuit's opinion, Section 16 "was both proposed and passed without meaningful debate." *Panama City* at 1544.

The Eleventh Circuit's opinion deemed it important that the United States Supreme Court decided two equal protection cases during 1993, namely *F.C.C. v. Beach Communications, Inc.*, 113 S.Ct. 2096 (1993) and *Heller v. Doe by Doe*, 113 S.Ct. 2637 (1993). *Panama City* at 1547 n.4. For example, the Eleventh Circuit stated at the conclusion of its opinion: "Given the current 'conceivable rational basis' test as articulated by the Supreme Court in *Beach Communications*, we are bound to hold that the fee cap exemption embodied in Section 16 of the Act presents no violation of the Equal Protection Clause." *Id.* at 1547. The Eleventh Circuit's opinion then goes out of its way to state that "the District Court did not have the benefit of *Beach Communications* or *Heller* when it decided this case." *Id.* at 1547, n.4.

The Eleventh Circuit's reference to the importance of both *Beach Communications* and *Heller* being decided after both *Nordlinger* and the district court's grant of an injunction is misplaced because neither of the former decisions changed in any way the standard for equal protection analysis. For example, *Beach Communications* specifically cited to *Nordlinger v. Hahn* for the proposition that equal protection analysis "does not demand for purposes of

rational basis review the legislature or governing decisionmaker actually articulate at any time the purpose or rationale supporting its classification." *Beach Communications*, 113 S.Ct. at 2102. In *Beach*, the Supreme Court then went on to find at least two rational bases for a common-ownership distinction in the Cable Communications Policy Act of 1984. *Id.* at 2103-04.

Similarly, *Heller* cited to *Nordlinger* on at least two occasions during its general discussion of the appropriate standard of review for equal protection analysis. *Heller*, 113 S.Ct. at 2642 and 2643. In *Heller*, the Court held that there was a rational basis for Kentucky's use of different standards in commitment proceedings for the mentally ill and the mentally retarded. *Id.*

Since both *Beach Communications* and *Heller* were decided no lower court has ever suggested that either *Beach Communications* or *Heller* has modified the straightforward equal protection analysis set forth in *Nordlinger*. In fact, no lower court has even attempted to distinguish *Beach Communications* and *Heller* from *Nordlinger* until the Eleventh Circuit rendered opinion in this case. Similarly, a review of this Court's opinions since both *Beach Communications* and *Heller* were decided does not suggest that either *Beach Communications* or *Heller* modifies the equal protection analysis set forth in *Nordlinger*. Moreover, a review of this Court's opinions in the most recent term reveals no attempt to distinguish *Beach Communications* and *Heller* from *Nordlinger*.

The Supreme Court in *Nordlinger* specifically reminded appellate courts that their "review does require that a purpose may conceivably or 'may reasonably have

been the purpose and policy' of the relevant governmental decisionmaker." *Nordlinger* at 2334. In addition, *Nordlinger* reminded appellate courts that in order to survive an equal protection challenge, "the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational." *Id.* at 2332. The Eleventh Circuit's purported rational basis analysis completely failed to meet this standard of review.

In analyzing the rational basis for the group practice's exemption, the Eleventh Circuit on its own came up with three purported bases. Those bases announced for the first time in the Eleventh Circuit's opinion were as follows:

> One possible conceivable rational basis is that the legislature chose to exempt group practices because of the insignificant involvement of group practices in diagnostic imaging services. Another possibility is that a distinction between group practices and sole practitioners is justified by the assumption that group practices have a larger patient base from which to recoup the costs of purchasing expensive diagnostic imaging equipment, and are therefore less likely to need to refer patients for unnecessary procedures to recover their investment. Finally, it is conceivable that the legislature knew the fee caps would drive out of business everyone subject to them, and thus chose to exempt a small group in order to maintain the availability of diagnostic imaging in Florida.

Panama City, at 1547.

The Eleventh Circuit's analysis is problematic in several respects. At the outset, each of these purported bases

involves a diagnostic imaging service. As stated previously, Section 16 of the Patient Self-Referral Act is not limited to diagnostic imaging services. It is also applicable to clinical laboratory services, physical therapy services, comprehensive rehabilitative services and radiation therapy services. *See* Chapter 92-178, § 7(3)(d), Laws of Florida; *Panama City*, at 1544. For example, Panama City Medical Diagnostics provides thousands of mammograms and ultrasounds a year that come under the strictures of Section 16. As Panama City's representative testified before Judge Stafford:

> Q. About how many procedures are performed on an annual basis?
>
> * * *
>
> A. About 20,000.
>
> * * *
>
> Q. And could you break that down by types of procedures?
>
> A. It's approximately 4,000 magnetic resonance procedures, 27 or 2800 CAT scans, CT's, a similar number, 27 or 2800 ultrasound procedures. Around 3,000 high, 2,000 mammography mammograms. Fifteen hundred nuclear medicine studies, and the remainder being routine x-rays.

(Testimony of James L. Sample, Tr. p. 30).

The first purported basis suggested by the Eleventh Circuit is that "the legislature chose to exempt group practices because of the insignificant involvement of group practices in diagnostic imaging services." *Panama City*, at 1547. In addition to being pure speculation made

for the first time on appeal by the Eleventh Circuit, it has nothing to do with an equal protection analysis of the validity of the exemption, especially in light of the contradictory suggestion in the third purported basis that the Florida legislature wanted to exempt group practices in order to maintain the availability of diagnostic imaging in Florida. The fact that group practices may have an insignificant involvement in providing diagnostic imaging services says nothing about how a group practice's exemption is related to the goal of the legislation which was to minimize patient self-referral as evidenced by the title and statutory history of the Patient Self-Referral Act.

If merely being a small part of an economic market is sufficient to justify an exemption, then the Florida Legislature could through economic regulation drive out of business every provider of a good or service other than one small group. That is the very essence of what the Equal Protection clause was designed to protect against. It is not sufficient alone to discriminate amongst classifications. There must be a rationale. To state that the discrimination is in favor of a small group with an insignificant part of the market provides absolutely no analysis for equal protection purposes. The proper equal protection analysis must answer the question of why should a narrow classification of a small part of the market be exempt. The fact that only a small part of the market is exempt does not provide any analysis, let alone a rational one.

The second purported rational basis set forth by the Eleventh Circuit "is that a distinction between group practices and solo practitioners is justified by the assumption that group practices have a larger patient

base from which to recoup the cost of purchasing expensive diagnostic imaging equipment, and are therefore less likely to need to refer patients for unnecessary procedures to recover their investment." *Id.* at 1547. This purported basis is pure fantasy. What it suggests is that group practices, which by definition involve more than one physician, will be less likely to have referrals than an individual physician. In fact, just the opposite is true. The more physicians in a group practice, the more likely that the patients visiting a diagnostic imaging equipment center will be the result of referral than if the expensive diagnostic imaging equipment is owned by a single physician. In other words, it is more likely that two or three physicians owning a particular piece of expensive equipment will in the aggregate have more referrals than when a single physician owns an expensive piece of equipment because the two or three physicians by definition should have a larger patient base than a single physician. No one has ever suggested anywhere or at any time that there are less referrals by group practices than by single physicians. More, *not less*, patient referral of all types occurs with respect to diagnostic imaging equipment owned by a group practice as opposed to an individual physician.

Moreover, this second purported rational basis ignores the fact that the fee caps in Section 16 apply to all providers, regardless of whether self-referral exists or not. If limiting the amount of self-referral was the purpose of Section 16, then why exempt group practice where self-referral occurs but include non-physician-owned entities? Conversely, because both group practices and sole practitioners have self-referrals, then why place

fee schedules on one and not the other? Section 16 does not fit any rationale relating to the self-referral problem.

Finally, the Eleventh Circuit's opinion speculates that the Florida Legislature "knew the fee caps would drive out of business everyone subject to them" but wanted some exempt entities to provide diagnostic imaging services. *Id.* at 1547. It is unbelievable that the Florida Legislature's conceivable or reasonable purpose was to violate due process by driving everyone out of the business of providing the above-referenced medical services including mammograms and ultrasounds. (If the Florida Legislature wanted to drive everyone out of business, presumably they would have done so directly instead of creating a fee cap and then exempting group practices.) However, even assuming that the Florida Legislature wanted to drive everyone out of business except for group practices and hospitals, that still does not provide a rational basis for the *exemption*. There has to be a rational basis for not driving out of business group practices and hospitals while at the same time driving out of business all other providers of the aforementioned medical services.

It is insufficient and meaningless for an appellate court to merely find that a tax or fee cap drives out of business a certain category or classification of providers of a particular service. Equal protection analysis requires that there be a rational basis so that "the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational." *Nordlinger*, 112 S.Ct. at 2332. In other words, there has to be an

answer to the question, *why drive everyone other than hospitals and group practices out of business*? The Eleventh Circuit's opinion does not even suggest an answer to this question.

The Eleventh Circuit's finding that a rational basis exists under these circumstances would be analogous to finding that the State of Florida, in an effort to limit the number of physicians making house calls, decides to impose fee caps on house calls but then exempts those physicians who drive pink cars because few physicians drive such cars. Such an act would violate equal protection even if it were rational to limit house calls. The relationship of the classification to the goal of reducing house calls renders the distinction, i.e., physicians who own pink cars to those who own other colored cars, both arbitrary and irrational. A statement that this was done to maintain some providers of the service in Florida is tautological and does not provide a rationale. By definition, any exemption does not affect those that are exempted. The correct question is why exempt those classifications but not the others?

CONCLUSION

This Court should grant certiorari and instruct the Eleventh Circuit that the actual motivation of the Florida Legislature in passage of Section 16 of the Patient Self-Referral Act can be considered by the trial court in performing the rational basis analysis set forth in *Nordlinger*, which mandates affirmance of the district court's finding that there was no rational basis for Section 16.

Respectfully submitted,

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Respondents.

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

PANAMA CITY MEDICAL DIAGNOSTICS, LTD., DR. FRANK SYFRETT, and DR. STEVE TAYLOR,

Plaintiffs,

v.

ROBERT B. WILLIAMS, in his official capacity as Secretary of the Florida Department of Health and Rehabilitative Services, et al.,

Defendants.

TCA 92-40198-WS
(Filed
July 21, 1992)

ORDER ENJOINING ENFORCEMENT OF SECTION 16, CHAPTER 92-178, LAWS OF FLORIDA

In this action, plaintiffs challenge the constitutionality of the Patient Self-Referral Act of 1992, Chapter 92-178, Laws of Florida (the "Act"). Before the court at this time is Plaintiffs' Motion for Preliminary Injunction (document 3). Plaintiffs seek an order enjoining the enforcement of one particular section of the Act, section 16, which section imposes a fee cap on providers of certain designated health care services. Plaintiffs allege that section 16 violates their right to equal protection under the law because, without apparent reason, some providers are exempt from the reach of the fee cap.

Defendants have responded in opposition to the motion. *See* documents 22 & 23.

A hearing was held on plaintiffs' motion on July 13, 1992. At that hearing, the parties agreed to consolidate the preliminary injunction hearing – limited to plaintiffs' equal protection challenge – with trial on the merits. After hearing the evidence and argument of counsel, this court concluded that section 16 of the Patient Self-Referral Act of 1992 violates the Equal Protection Clause of the United States Constitution. Plaintiffs' request for injunctive relief was therefore granted. At this time, the court sets forth its reasons for the injunction as required by Rule 65(d) of the Federal Rules of Civil Procedure.

I. BACKGROUND

On April 8, 1992, the Patient Self-Referral Act of 1992 became law. The legislation was intended to address concerns about a physician's referral of patients to health care businesses in which the referring physician owns an interest. The legislature found that these self-referral practices "may limit or eliminate competitive alternatives in the health care services market, may result in overutilization of health care services, may increase costs to the health care system, and may adversely affect the quality of health care." Chapter 92-178, Section 7(2), Laws of Florida. To its credit, the legislature wanted to protect the citizens of Florida from the unnecessary and costly health care expenditures thought to be associated with self-referral practices. *Id.* To provide such protection, the legislature enacted the Patient Self-Referral Act, section 4(a) of which prohibits – with certain exceptions – physicians

from referring their patients to medical facilities in which the physicians have investment interests. Allowing a period of time for divestiture, the legislature set the prohibition to go into effect on October 1, 1995.

Fee regulation, as embodied in section 16, was first presented to the Florida Senate on March 12, 1992, the day before the Act was passed. The senator who introduced the idea of a fee cap explained to members of the Senate that physicians would agree to immediate rate regulation if the divestiture period were extended for one year – a quid pro quo of sorts. With little discussion, the Senate adopted both the amendment imposing the fee cap as well as an amendment extending the effective date from the original proposed date of October 1, 1994, to the date finally incorporated into the Act, October 1, 1995.

The fee cap that was thus added to the Act applies to providers of certain "designated health services," defined by section 7(3)(d) of the Act to mean "clinical laboratory services, physical therapy services, comprehensive rehabilitative services, diagnostic imaging services, and radiation therapy services." This cap – 115 percent of the Medicare limiting charge – applies whether or not the patient receiving a service is referred from a health care provider with an investment interest in the entity providing the designated health service. With the exception of patients who are eligible for Medicaid or Medicare reimbursement, section 16 applies to the fees charged for all patients who receive designated health services, whether the entity providing the designated service has *any* physician ownership or not. Should there be a violation of section 16, an administrative fine not to exceed $5,000 per

violation may be imposed and collected by the appropriate licensing board.

Importantly, section 16 imposes price controls on all providers of designated health services *except* hospitals and group practices. Hospitals are exempt whether they are public or private, whether they are joint ventures or non-joint ventures. Group practices – defined under section 7(3) of the Act as groups of two or more physicians, dentists, or optometrists organized as partnerships, professional corporations, or similar associations – are exempt whether the group consists of two physicians of like expertise practicing in the same office or whether the group consists of many physicians of different expertise practicing in a large medical complex. Neither the Act itself nor the legislative history, including the discussion that took place on the Senate floor, provides any insight into what the legislature was thinking when it failed to apply the fee caps to all competing providers of designated health services. For whatever reason, the legislature chose to classify and treat competing providers of designated health services differently.

In large part, the legislature based its self-referral legislation upon the results of a study that was conducted by the Health Care Cost Containment Board ("HCCB") at the direction of the 1989 Legislature. *See* Chapter 89-354, Section 6, Laws of Florida. The enabling legislation directed the HCCB to conduct a special study of ownership or compensation arrangements ("joint ventures") between persons providing health care. Specifically, the HCCB was directed to provide the legislature with data-based conclusions regarding the scope and nature of joint ventures among health care providers and the impact of

joint ventures on costs, access, utilization, and quality of health care services in Florida. The legislature did not direct the HCCB to study the relative price of services, and the HCCB has expressly said that its study did not address the issue of price. In a written presentation to the Florida House of Representatives, dated June 2, 1992, the HCCB explained:

> The Board's study did not address the issue of "price." Instead it compared utilization in joint venture and non-joint venture facilities utilize at a higher rate. The price or charge for he service was often lower in joint venture facilities, but increased utilization resulted in higher revenues. The study did not conclude that the prices charged in either type of facility were reasonable or unreasonable, and it would be an over-simplification to conclude that banning self-referral will correct the over-utilization problem and, therefore, reduce costs.

Document 3, Exhibit A.

Most particularly, the HCCB study did not address the prices charged by group practices for designated health services. Indeed, according to Dr. Bodendorf, who, as Director of Operations for the HCCB, directed the joint ventures study, the legislature was given *no* information about group practices in Florida. While it was informed that referrals within group practices ("in-house referrals") are given a safe harbor from sanctions under the federal anti-kickback legislation, the legislature was given no data from which it could decide whether in-house group practice referrals, as compared to out-of-house self-referrals, have a different effect upon the cost and utilization of designated health services in Florida. It

was also given no data from which to decide whether the prices charged by group practices for designated health services were more or less than the prices charged by other providers of designated health services. In short, the legislature had few, if any, facts upon which to base a fee cap exemption for group practices.

Interestingly, the legislature's attention was directed to a study reported in the December 1990 issue of the *New England Journal of Medicine*.[1] Such study compared frequencies of, and charges for, imaging procedures ordered by a sample of over 6,400 physicians, some of whom had imaging equipment located in their own offices and some of whom referred their patients to outside radiologists for imaging procedures. The physicians who owned their own imaging equipment, on average, ordered from 4 to 4.5 times more procedures than physicians who referred their patients to outside radiologists. In addition, the charges for the in-office procedures were, on average, 4.5 to 7.5 times more per procedure than fees charged per procedure for patients of radiologist-referring physicians. To be sure, the study did not involve group practices and it did not involve physicians in Florida. The study did demonstrate, however, that physicians performing in-office health services – like physicians in a group practice – may be just as tempted to overutilize and overcharge for designated health services as physicians who refer

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[1] B.C. Hillman, C.A. Joseph, M.R. Mabry, J.H. Sunshine, S.D. Kennedy, and M. Noether. "Frequency and Costs of Diagnostic Imaging in Office Practice – A Comparison of Self-Referring and Radiologist-Referring Physicians." *New England Journal of Medicine*, Volume 323, No. 23, at 1604-1608 (1990).

their patients to freestanding facilities outside their practices.

The legislature was given somewhat more information about hospitals than about group practices. It was informed that physician ownership of hospitals is uncommon, but not unheard of, in Florida. It was also informed that hospital participation in joint venture arrangements, particularly for out-patient services and most particularly for diagnostic imaging services, is limited but not insignificant in Florida. While it was reminded that hospitals compete with other entities for the provision of designated health services, the legislature was not given a charge comparison between hospitals and their competitors. Nor was it given a charge comparison for such services as between public and private hospitals, or between hospitals with outpatient facilities and hospitals with in-house departments, or between joint venture hospitals and non-joint venture hospitals. Again, the legislature had few facts upon which to base a statutory exemption affecting charges.

Although the HCCB study did not provide the legislature with meaningful information upon which to base its selective fee cap, the study did demonstrate to the legislature that joint venture arrangements in Florida are very common in certain types of facilities. For example, ownership by referring physicians was reported in approximately ninety percent of the diagnostic imaging centers, fifty percent of the radiation therapy centers, fifty percent of the clinical laboratories, and forty percent of the physical therapy-rehabilitation centers. In contrast, among all other facility types surveyed, less than fifteen percent reported physician ownership.

The results of its study, which by no means presented a uniform picture, led the HCCB to conclude that self-referral leads to increased utilization of health services – particularly the "designated health services" listed in section 3(d) of the Act. The HCCB found, for example, that independent clinical laboratories owned by referring physicians performed almost twice as any diagnostic tests and received over twice as much in gross revenues per patient as similar non-joint venture facilities. Physician ownership resulted in thirty-five to forty-three percent more physical therapy visits per patient, depending upon type of facility, physical therapy only or comprehensive rehabilitation. Although the dearth of Florida non-joint venture diagnostic imaging centers precluded a meaningful comparison of Florida joint venture and non-joint venture diagnostic imaging centers, a comparison of imaging centers in three Florida metropolitan areas with imaging centers in Baltimore revealed that utilization rates in Florida were substantially higher than in Baltimore, where there are relatively few joint venture imaging centers. In sum, the legislature was presented facts upon which it could reasonably base a decision to prohibit joint venture arrangements for the provision of designated health services.

Not until after the Act was signed into law did the HCCB present the legislature with information about the expected impact of the fee caps. In response to a request from the legislature, the HCCB developed a model for estimating or simulating the profitability of designated health services with fees capped at various increments of the Medicare limiting charge. On June 2, 1992, the HCCB reported the following conclusions to the legislature: (1)

Physical therapy and rehabilitation centers, but not clinical laboratories, diagnostic imaging centers, or radiation therapy centers, could cover both direct costs as well as indirect costs if fees were capped at 130, 140, or 170 percent of the Medicare limiting charge; (2) Radiation therapy centers could not cover direct costs, let alone total costs, even if fees were set at 170 percent of the Medicare limiting charge; (3) Diagnostic imaging centers could cover direct costs but not total costs if fees were set at 130 percent of the Medicare limiting charge; and (4) Clinical laboratories could cover direct but not total costs if fees were set at 140 percent of the Medicare limiting charge. The legislature considered this information when it returned to the topic of fee caps in its June 1992 special session. When the legislature was unable to reach agreement about proposed amendments affecting section 16 fee caps, this court became the battleground.

II. DISCUSSION

Plaintiffs in this case seek to enjoin enforcement of section 16 on the basis that the fee cap – applied to some, but not all, providers of designated health services – violates the Equal Protection Clause of the Fourteenth Amendment. More particularly, plaintiffs contend that section 16 violates their right to equal protection because section 16 exempts hospitals and group practices from its reach without any rational basis for doing so.

Plaintiffs do not contend – nor could they – that the Florida Legislature has no right at all to regulate health care costs. They do not dispute the fact that the State of Florida has a legitimate, even compelling, interest in

ensuring that its citizens receive affordable medical treatment. Nor do they dispute the fact that escalating health care costs have become a major burden to society, a burden that demands the legislature's attention. Surely, it is beyond question that the legislature must address this onerous burden and must be lauded for its efforts to do so.

Plaintiffs also do not challenge, for purposes of their equal protection claim, the particular cap – 115 percent of the Medicare limiting charge – chosen by the legislature. Whether reasonable or unreasonable, the size of the cap is not at issue here. Instead, plaintiffs ask this court to decide whether it was reasonable for the legislature to impose a fee cap – any fee cap – on designated health services when that fee cap affects competing providers differently. In deciding this issue, the court must consider (1) whether there was a plausible policy reason to explain why the legislature chose to distinguish between the treatment accorded hospitals and group practices on the one hand and all other providers of designated health services on the other hand, (2) whether there were facts before the legislature upon which to base this distinction and, if so, was it rational for the legislature to consider the facts true, and (3) whether the relationship of the distinction to the legislative goal is so attenuated as to render the distinction arbitrary or irrational. *Nordlinger v. Hahn*, 6 FLW Fed. S431, S433 (U.S. June 18, 1992).

As the United States Supreme Court has long emphasized, the Equal Protection Clause does not forbid classifications that result in inequality as long as those classifications rationally further a legitimate state interest. *Nordlinger*, 6 FLW Fed. at S433. While a legislature

need not actually articulate the purpose or rationale supporting its classification, rational-basis review does require "that a purpose may conceivably or 'may reasonably have been the purpose and policy' of the relevant governmental decisionmaker." *Nordlinger*, 6 FLW Fed. at S434 (quoting *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 528-29 (1959)). *See also Schweiker v. Wilson*, 450 U.S. 221, 235 (1981) (classificatory scheme must "rationally advanc[e] a reasonable and *identifiable* governmental objective" (emphasis added)).

In order to decide whether it was rational to exempt group practices and hospitals from the reach of section 16, it must first be determined what objective the legislature had in mind when it enacted the fee cap legislation. Unfortunately, the legislature's cursory treatment of section 16 makes it difficult to discern just what the legislature did intend when it enacted the fee cap. Three possibilities are suggested by the record.

First, the express policy reason for Chapter 92-178, which includes section 16, was to protect the citizens of Florida from the perceived abuses of joint ventures and physician self-referral. Such policy reason might explain or support selective fee caps *if* the legislature had chosen to impose its fee caps upon joint ventures but not upon non-joint ventures, or upon services performed at clinics owned by self-referring physicians but not upon others. Certainly, there were facts before the legislature upon which it could base a joint venture versus non-joint venture distinction. The legislature, however, did not make that distinction. Both joint and non-joint ventures are subject to the fee caps; both joint and non-joint ventures are exempt from the fee caps. If the legislature meant for

section 16 to target the abuses of physician self-referral, the classifications set up in section 16 missed the mark.

Second, the colloquy that took place on the Senate floor the evening section 16 was added to the Act suggests that the legislature intended for section 16 to be the quid pro quo for extension of the divestiture deadline. Such rationale might explain selective fee caps *if* the legislature had chosen to impose its fee caps upon services performed at facilities owned by self-referring physicians having an interest in divestiture but not upon services performed at facilities owned by persons having no reason to divest their interest. The legislature, however, did not make that distinction. Section 16 targets both those who are, and those who are not, affected by the self-referral prohibition and thus the divestiture deadline; it also exempts both those who are, and those who are not, interested in divestiture. Again, the legislature missed the mark if it meant for a quid pro quo rationale to explain the classifications set up in section 16.

Third, the legislature could have intended to reduce the cost of designated health services without targeting self-referring physicians in particular. If so, why were hospitals and group practices excluded? The HCCB study provided no information from which the legislature could decide whether hospitals and group practices in Florida charge more or less for designated health services than other providers. Indeed, the legislative record was so lacking in facts about price, especially as to the prices charged by group practices and hospitals, that it is difficult to surmise why the legislature wanted to protect these particular entities.

Defendants suggest that hospitals were exempted because hospitals need to subsidize the cost of providing care to indigent patients. Furthermore, defendants suggest, abuses within hospitals are not as likely to occur because hospitals are subject to review and regulation by the State of Florida. Although this court has some doubts about defendants' suggestions, the court shall assume, without deciding, that the legislature could have relied upon these as rational reasons for exempting hospitals. Nonetheless, section 16 fails to withstand equal protection scrutiny because this court cannot find – in a record that is devoid of facts as to group practices – a plausible policy reason for exempting group practices.

The court is not convinced otherwise by defendants' suggestion that group practices merit an exemption from fee cap legislation because the federal government exempts group practices from the reach of federal anti-referral legislation. This court finds the analogy inapposite. That group practices are provided a safe harbor from sanctions under the federal anti-referral statute does not mean that group practices should be allowed to set prices, without limit, while their competitors – providing the very same designated health services – are limited by a fee cap that will, consistent with the evidence before this court, put many of these competitors out of business. Surely, equal protection under the Constitution means more.

Accordingly, it is ORDERED:

1. Because this court finds section 16 violative of the Equal Protection Clause of the United States Constitution,

plaintiffs' request for injunctive relief is hereby GRANTED.

2. Defendants are hereby enjoined from enforcing section 16 of Chapter 92-178, Laws of Florida, against the plaintiffs and intervenors in this action.

3. The plaintiffs having indicated at the injunction hearing that they might dismiss the remaining claims in this case, judgment shall not enter, under Rule 54(b) of the Federal Rules of Civil Procedure or otherwise, until plaintiffs advise the court of their plans.

4. Defendants' Motion for Amendment or Clarification of Judgment, *see* documents 57 & 58, in which defendants ask this court to strike the words "groups practices" from section 16, shall be considered in due course after all parties have had the opportunity to respond to such motion.

DONE AND ORDERED this 21st day of July, 1992.

/s/ William Stafford
WILLIAM STAFFORD
CHIEF JUDGE

APPENDIX B

PANAMA CITY MEDICAL DIAGNOSTIC LTD., Dr. Frank Syfrett, and Dr. Steve Taylor, Plaintiffs-Appellees.

Am-Med Associates, A Florida General Partnership, Winter Park MRI Partners, Ltd. Medi-Tek Winter Park, Inc., MRI of Wellington, Ltd., Meditek-Wellington, Inc., Meditek-Palm Beach Gardens, Inc., Clay Medco, d/b/a Orange Park Diagnostic Center, Prime Care Diagnostic, Inc., d/b/a Prime Care Diagnostic Center, Magnedocs, Ltd., A Florida Limited Partnership, by and through its general partner, Magnadoc, Inc., a Florida Corporation, Magwest Ltd., a Florida Limited Partnership, by and through its general partner, Westdoc, Inc., a Florida Corporation, Kendall Therapy Center, Ltd., d/b/a Kendall Therapy Center, a Florida Limited Partnership, by and through its general partner, CHC of South Miami, Inc., a Florida Corporation, Medical Park Diagnostic Multicenter, d/b/a Medical Park, a Florida Limited Partnership, by and through its general partner, CHC of South Miami, Inc., a Florida Corporation, Kendall Medical Enterprises, Inc., d/b/a Kendall Diagnostic Center, a Florida Corporation, Health Images, Inc., Robert Kagan, M.D., Magnetic Imaging Systems I, Ltd., a Florida Limited Partnership, by and through its general partner, Nuclear Magnetic Imaging, Inc., a Florida Corporation, Intervenors-Appellees,

v.

Robert B. WILLIAMS, in official capacity as Sec. of Florida Dept. of HRS, George Stuart, in his official capacity as Sec. of Florida Dept. of Professional Reg., Board of Medicine, Board of Osteopathic Medical Examiners, Board of Chiropractic, et al., Defendants-Appellants,

Citizens of the State of Florida,
Intervenor-Appellant.

No. 92-2826.

United States Court of Appeals,
Eleventh Circuit.

Feb. 15, 1994.

Physicians and medical organization brought action challenging constitutionality of Florida statute exempting hospitals and group practices from statutory fee cap on providers of diagnostic imaging services. The United States District court, Northern District of Florida. No. TCA 92-40198-WS, William Stafford, J., permanently enjoined Florida from enforcing statute. On appeal, the Court of Appeals, Dubina, Circuit Judge, held that exemption for hospitals and group practices had conceivable rational bases and, thus, did not violate equal protection.

Reversed and remanded.

Stephanie A. Daniel, Asst. Atty. Gen., Dep. of Legal Affairs, Tallahassee; FL, for Williams, et al.

Stephen M. Presnell, Office of Pubic Counsel, Tallahassee, FL, for Citizens of Florida.

Robert J. Winicki, Don H. Lester, Mahoney Adams & Criser, P.A., Jacksonville, FL, for Panama City Medical Diagnostics, Ltd., Frank Syfrett, Steve Taylor.

Dennis A. Richard, Richard and Richard, P.a. Miami, FL, for Winter Park MRI Partners, Meditek-Winter Park, MRI Wellington, Meditek-Wellington, Meditek-Palm Beach Gardens.

John H. Pelzer, Ruden, Barnett, McClosky, Smith, Schuster & Russell, P.A., Ft. Lauderdale, FL. for Robert Kagan, Magnetic Imaging Systems.

Michael W. Moskowitz, Borkson, Simon, Moskowitz & Mandell, P.A., Ft. Lauderdale, FL, for Magnedocs, Magwest, Kendall Therapy Center, Medical Park Diagnostic Multi-center, Kendall Medical Enterprises.

Barry S. Richard, Greenberg, Traurig, Hoffman, Lipoff, Rosen & Quentel, Tallahassee, FL, for intervenors/appellees Meditek Entities.

Appeal from the United States District Court for the Northern District of Florida.

Before DUBINA and CARNES, Circuit Judges, and MORGAN, Senior Circuit Judge.

DUBINA, Circuit Judge:

This is an appeal from an order of the district court permanently enjoining the state of Florida from enforcing a statute which imposes fee caps on providers of diagnostic imaging services. Specifically, appellants Robert B. Williams, et al. ("Williams"), challenge the district court's finding that the exemption from the fee cap for hospitals and group practices has no rational basis and thus, violates the Equal Protection Clause of the United States Constitution. Alternatively, Williams argues that even if the exemption is unconstitutional, the proper remedy is severance of the offending provision, as opposed to an injunction applied to the entire section. We hold that the fee cap exemption for hospitals and group practices has a conceivable rational basis and thus does not violate the

Equal Protection Clause. Accordingly, we reverse the district court's order enjoining the enforcement of Chapter 92-178, Section 16, Laws of Florida.

I. *FACTS*

For almost two decades, the Florida Legislature has grappled with the extremely difficult and complex issue of health care reform. In 1979, to aid in regulation of the health care industry, the legislature created the Health Care Cost Containment Board ("HCCB"). Although the HCCB was originally empowered only to review hospital budgets and certificates of need, its power has expanded greatly over the years. Currently, the HCCB has broad-based authority to review the costs of health care in the state of Florida.

In reaction to concern about physician referral practices and cost containment issues, the legislature in 1989 authorized the HCCB to conduct a study of joint venture arrangements, in which health care providers owned an interest in the clinics to which they referred patients for diagnostic imaging services. Diagnostic imaging services include, among other things: magnetic resonance imaging (MRI) procedures, computerized axial tomography (CAT) scans, and x-rays. The study revealed that both the cost and the utilization of diagnostic services in Florida is significantly higher than the national average. For example, it was reported that in 1989. Florida had more diagnostic imaging machines than the entire nation of Canada, with a population twice that of Florida, and West Germany, with a population five times that of Florida.

The study also revealed that joint venture arrangements predominated in this sphere of health care service.

The legislature prepared a bill. "The Patient Self-Referral Act of 1992" ("the Act"), which incorporated the findings of the HCCB study. Section 7(2) of the Act contains a statement of legislative intent, which explains that the Act was created in order to address concerns over referral of patients to a provider of health care services in which the referring health care provider is an investor. The legislature intended to discourage such self-referral, and it was the stated intent to provide guidelines to health care providers regarding prohibited patient referrals. The Act was passed and became effective on April 8, 1992.

The original bill did not include fee caps as a cost containment measure. The fee schedule embodied in Section 16 of the Act, with which we are concerned here, was first proposed shortly before the Act was passed. As observed by the district court, Section 16 was passed with "little discussion" and was afforded only "cursory treatment;" it was both proposed and passed without meaningful debate.

Section 16 of the Act imposes a fee schedule on all providers of "designated health services," defined by the Act in section 7(3)(d) to mean "clinical laboratory services, physical therapy services, comprehensive rehabilitative services, diagnostic imaging services, and radiation therapy services." The fee schedule set a maximum cap on the fees for designated health services "limited to no more than 115% of the Medicare limiting charge for non-participating physicians for such services,

including technical and professional components." As drafted, the Section 16 fee schedule applies regardless of whether or not the patient referral is from a health care provider who has an investment interest in the entity offering the designated service. The fee cap does not apply to patients eligible for Medicaid or Medicare reimbursement; rather, it applies to "private payors" who pay personally or through insurance coverage. The effect of the fee cap will be significant; and HCCB study completed after the legislation was passed indicates that providers subject to the fee cap could be put out of business.

Specifically exempt from the fee schedule are designated health services provided by hospitals and physician group practices. Thus, all other entities or persons providing such services, including physicians who are sole practitioners or who serve patients outside their group practices, are subject to the Section 16 fee restrictions. It is the constitutionality of this exemption which is at issue in the present case.

II. *PROCEDURAL HISTORY*

In response to the fee schedule legislation, Panama City Medical Diagnostics, Ltd., Dr. Frank Syfrett, and Dr. Steve Taylor (collectively, "the plaintiffs"), filed a complaint for damages. Named as defendants were Robert Williams ("Williams"), in his official capacity as Secretary of the Department of Health and Rehabilitative Services, George Stuart ("Stuart"), in his official capacity as Secretary of the Department of Professional Regulation, and the Boards of Medicine, Optometry, Dentistry, Podiatric

Medicine, Chiropractic and Osteopathic Medical Examiners ("the Board defendants"). In general, the plaintiffs challenge the constitutionality of the Act, alleging for our purposes that the hospital and group exemptions to the fee cap violate the Equal Protection Clause.

The plaintiffs filed a motion for a preliminary injunction, seeking an order enjoining the enforcement of Section 16 of the Act. This motion was joined by a variety of intervenors. A lengthy hearing was held on the motion, and it was agreed by the parties that the hearing would be final in terms of the equal protection issue. Following the hearing, the district court issued an oral ruling that there existed no rational basis for the group practice exemption to the fee schedule provided in Section 16, and that Section 16 therefore violated the Equal Protection Clause. The court held that the plaintiffs were entitled to a preliminary injunction, which would be made permanent.

Stuart and Williams then filed a motion for amendment or clarification of judgment, asking that the court cure the equal protection defect in Section 16 by severing the group practice exemption. The court entered a written order enjoining enforcement of Section 16, and further, denied the motion for severance. The issuance of the permanent injunction and the denial of the motion to sever are the subjects of this appeal.[1]

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[1] The remaining challenges to the Act are still pending in the district court. That case is abated pending the outcome of this appeal.

III. *STANDARD OF REVIEW*

A district court's grant of an injunction will be reversed only when the district court abused its discretion. *Planned Parenthood Association of the Atlanta Area, Inc. v. Miller,* 934 F.2d 1462, 1471 (11th Cir.1991); *Haitian Refugee Center, Inc. v. Baker,* 953 F.2d 1498, 1505 (11th Cir.), *cert. denied,* ___ U.S. ___, 112 S.Ct. 1245, 117 L.Ed.2d 477 (1992). Findings of fact made in connection with the grant of a preliminary injunction are set aside only if clearly erroneous. Conclusions of law are reviewed *de novo. Planned Parenthood,* 934 F.2d at 1471, *citing Ferrero v. Associated Materials, Inc.,* 923 F.2d 1441, 1444 (11th Cir.1991).

IV. *DISCUSSION*

A. *Equal Protection Claim*

The crux of Williams' argument is that Section 16 presents no violation of the Equal Protection Clause, and thus the district court erred in granting the preliminary injunction because the plaintiffs did not meet all of the requisite elements. In order to prevail, a party seeking a preliminary injunction must establish: (1) a substantial likelihood that he or she will ultimately prevail on the merits; (2) a showing that he or she will suffer irreparable injury unless the injunction issues; (3) proof that the threatened injury to him or her outweighs the harm the injunction may cause the opposing party; and (4) a showing that granting the injunction would not be adverse to the public interest. *Duke v. Cleland,* 954 F.2d 1526, 1529 (11th Cir. 1992). Williams contends that the plaintiffs did

not meet the first necessary element – substantial likelihood of success on the merits – because as a matter of law no equal protection violation exists in this case. We agree.

The Equal Protection Clause does not forbid classifications. It simply keeps governmental dicisionmakers from treating differently persons who are in all relevant respects alike." *Nordlinger v. Hahn*, 505 U.S. ___, ___, 112 S.Ct. 2326, 2331, 120 L.Ed.2d 1 (1992). Therefore, unless the case involves a suspect class or a fundamental right, the Equal Protection Clause requires only that the classification be rationally related to a legitimate state interest. *Id.* at ___ - ___, 112 S.Ct. at 2331, 32. *See also Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439-441, 105 S.Ct. 3249, 3254-3255, 87 L.Ed.2d 313 (1985). The present case does not involve a suspect class, nor does it deal with a fundamental right; thus, Florida must only show a rational basis for the exemption from the fee cap.

Here, we must give great deference to the Florida Legislature because lawmakers are presumed to have acted constitutionally "despite the fact that, in practice, their laws result in some inequality." *Nordlinger*, 505 U.S. at ___, 112 S.Ct. at 2331, *quoting McGowan v. Maryland*, 366 U.S. 420, 425-426, 81 S.Ct. 1101, 1105, 6 L.Ed.2d 393 (1961). In addition to this threshold presumption, the Supreme Court has clearly held that in cases involving economic classifications, the rational basis test is extremely lenient.

> [E]qual protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. In areas of social and economic

> policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.

F.C.C. v. Beach Communications, Inc., ___ U.S. ___, ___, 113 S.Ct. 2096, 2101, 124 L.Ed.2d 211 (1993) (citations omitted). This circuit has also held that "[a] searching inquiry into the validity of legislative judgments concerning economic regulation is not required. . . . The task is to determine if *'any set of facts may be reasonably conceived of* to justify' the legislation." *Cash Inn of Dade, Inc. v. Metropolitan Dade County*, 938 F.2d 1239, 1241 (11th Cir.1991) (citations omitted, emphasis added). Thus, our review of this case must be "a paradigm of judicial restraint." *Beach Communications*, ___ U.S. at ___, 113 S.Ct. at 2101.

Restraints on judicial review have "added force" in cases, such as the one at bar, in which the legislature must engage in line-drawing. *Id.* ___ U.S. at ___, 113 S.Ct. at 2102.

> Defining the class of persons subject to a regulatory requirement . . . "inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line, and the fact [that] the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration."

Id. quoting United States Railroad Retirement Bd. v. Fritz, 449 U.S. 166, 179, 101 S.Ct. 453, 461, 66 L.Ed.2d 368 (1980). In regulating economic entities, legislatures are forced to draw distinctions between those that will fall under the

regulations, and those that will not. "This necessity renders the precise coordinates of the resulting legislative judgment virtually unreviewable, since the legislature must be allowed leeway to approach a perceived problem incrementally." *Beach Communications*, ___ U.S. at ___, 113 S.Ct. at 2102. Thus, legislatures are not required to address all aspects of a particular problem in one fell swoop. Rather.

> reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others.

Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 489, 75 S.Ct. 461, 465, 99 L.Ed. 563 (1955) (citations omitted).

Because legislatures are not required to articulate reasons for the enactment of a statute,[2] "it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." *Beach Communications*, ___ U.S. ___, 113 S.Ct. at 2102. Therefore, in evaluating the rational basis for a statute, it is entirely permissible to rely on rationales that were not contemplated by the legislature at the time of the statute's passage.[3] *Cash Inn*, 938 F.2d at

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[2] "[A] legislature that creates these categories need not 'actually articulate at any time the purpose or rationale supporting its classification.' " *Heller v. Doe by Doe*, ___ U.S. ___, ___, 113 S.Ct. 2637, 2642, 125 L.Ed.2d 257 (1993), *quoting Nordlinger*, 505 U.S. at ___, 112 S.Ct. at 2334.

[3] For example, in *Beach Communications*, one of the rationales relied on by the Court was proffered not by the legislature

1242. With these legal principles in mind, we consider the merits of this case.

Following a hearing on the equal protection issue, the district court entered an order enjoining enforcement of Section 16. In its order, the court focused on the legislature's objective in enacting the fee cap and noted that "[t]hree possibilities are suggested by the record." (July 21, 1992 order at p. 13.) The three possible objectives were: (1) a desire to protect the citizens of Florida from the harms of physician self-referral; (2) that the fee cap exemptions were a political quid pro quo to enable passage of the bill; or (3) a desire to decrease the cost of designated services, no matter who was providing them. The district court found these possible objectives unpersuasive as justifications for the fee cap exemptions.

However, the district court assumed without deciding that the legislature may have had a legitimate reason for exempting hospitals, due to the fact that hospitals in the state of Florida are already subject to cost containment measures. Nevertheless, the court ultimately held Section 16 unconstitutional because it found no rational basis for the exemption of group practices. The district court simply did not believe that the impetus for the fee cap exemptions was rationally related to any purpose that could be gleaned from the record.

The district court erred both in searching for the actual motivation of the legislation, and in confining its

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in support of the challenged statute, but rather by a circuit judge, concurring in the circuit court's opinion. ___ U.S. at ___, 113 S.Ct. at 2103.

analysis to the facts on the record. This focus was in error because, as noted above, whether the hypothetical rationale actually motivated the legislation is *irrelevant*. The proper inquiry is concerned with the *existence* of a conceivable rational basis, not whether that basis was actually considered by the legislative body. In addition, a state "has no obligation to produce evidence to sustain the rationality of a statutory classification." *Heller*, ___ U.S. at ___, 113 S.Ct. at 2643. Rather, the burden is on the challenger to disprove every conceivable basis which might support the classification, "whether or not the basis has a foundation in the record." *Id.*

For example, in *Beach Communications*, the Supreme Court dealt with an equal protection challenge to legislation regulating cable television. The regulation in question drew a distinction between facilities that served separately owned and managed buildings and those that served one or more buildings under common management or ownership. Cable facilities in the first category were exempt from the regulation provided that they did not use public rights-of-way. The issue before the Court was whether any conceivable rational basis existed to justify the distinction. *Id.* ___ U.S. at ___, 113 S.Ct. at 2099.

The Court concluded that the distinction did not violate the Equal Protection Clause. *Id.* ___ U.S. at ___, 113 S.Ct. at 2104. The Court found that there were at least two possible bases for the distinction, and thus concluded that the legislation had a rational basis. Significantly, the Court stated that even if the assumptions underlying the rationales were erroneous, "the very fact that they are 'arguable' is sufficient, on rational-basis review, to 'immuniz[e]' the congressional choice from constitutional

challenge." *Id. quoting Vance v. Bradley*, 440 U.S. 93, 112, 99 S.Ct. 939, 950, 59 L.Ed.2d 171 (1979).

In present case, a number of the various scenarios are "arguable." First and foremost, the hospital exemption has a conceivable rational basis due to the fact that Florida hospitals are already subject to cost containment measures. Second, while certainly a more difficult issue, it seems that several conceivable rationales exist to support the group practices exemption. One possible conceivable rational basis is that the legislature chose to exempt group practices because of the insignificant involvement of group practices in diagnostic imaging services. Another possibility is that a distinction between group practices and sole practitioners is justified by the assumption that group practices have a larger patient base from which to recoup the costs of purchasing expensive diagnostic imaging equipment, and are therefore less likely to need to refer patients for unnecessary procedures to recover their investment. Finally, it is conceivable that the legislature knew the fee caps would drive out of business everyone subject to them, and thus chose to exempt a small group in order to maintain the availability of diagnostic imaging in Florida. As noted above, even if these rationales are based on faulty premises, the fact that they are arguable guides our decision in this case.

Therefore, given the current "conceivable rational basis" test as articulated by the Supreme Court in *Beach Communications*, we are bound to held that the fee cap exemptions embodied in Section 16 of the Act present no violation of the Equal Protection Clause.

B. *Severance*

Williams argues in the alternative that if the fee cap exemptions are found to violate the Equal Protection Clause, they should be severed from the Act rather than enjoining enforcement of the entire section. Because we hold that the exemptions pose no constitutional violation, severance becomes a non-issue.

V. *CONCLUSION*

The fee cap exemptions in Section 16 of the Act do not violate the Equal Protection Clause, and thus the district court's order enjoining the enforcement of Section 16 was in error.[4]

REVERSED and REMANDED.

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[4] It is worth mentioning that the district court did not have the benefit of *Beach Communications* or *Heller* when it decided this case.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 92-2826

(Filed Apr. 29, 1994)

PANAMA CITY MEDICAL DIAGNOSTIC LTD., DR. FRANK SYFRETT, and DR. STEVE TAYLOR,

Plaintiffs-Appellees,

AM-MED ASSOCIATES, A Florida General Partnership; WINTER PARK MRI PARTNERS, LTD.; MEDI-TEK WINTER PARK, INC.; MRI OF WELLINGTON, LTD.; MEDITEK-WELLINGTON, INC.; MEDITEK-PALM BEACH GARDENS, INC.; CLAY MEDCO, d/b/a Orange Park Diagnostic Center; PRIME CARE DIAGNOSTIC, INC., d/b/a Prime Care Diagnostic Center; MAGNEDOCS, LTD., a Florida Limited Partnership by and through its general partner, MAGNADOC, INC., A Florida corporation; MAGWEST, LTD., A Florida Limited Partnership by and through its general partner, WESTDOC, INC., a Florida corporation; KENDALL THERAPY CENTER, LTD. d/b/a Kendall Therapy Center, a Florida Limited Partnership, by and through its general partner, CHC OF SOUTH MIAMI, INC., A Florida corporation; MEDICAL PARK DIAGNOSTIC MULTICENTER, d/b/a Medical Park of Florida Limited Partnership, by and through its general partner, CHC of SOUTH MIAMI, INC., a Florida corporation; KENDALL MEDICAL ENTERPRISES, INC., d/b/a Kendall Diagnostic Center, a Florida Corporation; HEALTH IMAGES, INC.; ROBERT KAGAN, M.D.; MAGNETIC IMAGING SYSTEMS I, LTD. a Florida Limited Partnership, by and through its general partner

NUCLEAR MAGNETIC IMAGING, INC., a Florida corporation,

Intervenors-Appellees,

versus

ROBERT B. WILLIAMS, in official capacity as Sec. of Florida Dept. of HRS; GEORGE STUART, in official capacity as Sec. of Florida Dept. of Professional Reg.; BOARD OF MEDICINE; BOARD OF OSTEOPATHIC MEDICAL EXAMINERS; BOARD OF CHIROPRACTIC, et al.

Defendants-Appellants,

CITIZENS OF THE STATE OF FLORIDA,

Intervenor-Appellant.

On Appeal from the United States District Court for the Northern District of Florida

---

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

Before: DUBINA and CARNES, Circuit Judges, and MORGAN, Senior Circuit Judge.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Joel F. Dubina
UNITED STATES CIRCUIT JUDGE

ORD-42
(9/91)

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 92-2826

(Filed Jun. 3, 1994)

PANAMA CITY MEDICAL DIAGNOSTIC LTD., DR. FRANK SYFRETT, and DR. STEVE TAYLOR,

Plaintiffs-Appellees,

AM-MED ASSOCIATES, A Florida General Partnership; WINTER PARK MRI PARTNERS, LTD.; MEDI-TEK WINTER PARK, INC.; MRI OF WELLINGTON, LTD.; MEDITEK-WELLINGTON, INC.; MEDITEK-PALM BEACH GARDENS, INC.; CLAY MEDCO, d/b/a Orange Park Diagnostic Center; PRIME CARE DIAGNOSTIC, INC., d/b/a Prime Care Diagnostic Center; MAGNEDOCS, LTD., a Florida Limited Partnership, by and through its general partner, MAGNADOC, INC., A Florida corporation; MAGWEST, LTD., A Florida Limited Partnership, by and through its general partner, WESTDOC, INC., a Florida corporation; KENDALL THERAPY CENTER, LTD., d/b/a/ Kendall Therapy Center, a Florida Limited Partnership, by and through its general partner CHC OF SOUTH MIAMI, INC., A Florida corporation; MEDICAL PARK DIAGNOSTIC MULTICENTER, d/b/a Medical Park, a Florida Limited Partnership, by and through its general partner, CHC of SOUTH MIAMI, INC., a Florida corporation; KENDALL MEDICAL ENTERPRISES, INC., d/b/a Kendall Diagnostic Center, a Florida Corporation; HEALTH IMAGES, INC.; ROBERT KAGAN, M.D.; MAGNETIC IMAGING SYSTEMS I, LTD. a Florida Limited Partnership, by and through its general partner

NUCLEAR MAGNETIC IMAGING, INC., a Florida corporation.

Intervenors-Appellees,

versus

ROBERT B. WILLIAMS, in official capacity as Sec. of Florida Dept. of HRS; GEORGE STUART, in official capacity as Sec. of Florida Dept. of Professional Reg.; BOARD OF MEDICINE; BOARD OF OSTEOPATHIC MEDICAL EXAMINERS; BOARD OF CHIROPRACTIC, et al.

Defendants-Appellants,

CITIZENS OF THE STATE OF FLORIDA,

Intervenor-Appellant.

On Appeal from the United States District Court for the Northern District of Florida

---

ORDER:

( ) The motion of _____ for ( ) stay ( ) recall and stay of the issuance of the mandate pending petitoin for writ of certiorari is DENIED.

(X) The moiton of _____ for (X) stay ( ) recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including July 1, 1994, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon expiration of the stay granted herein, unless the

above mentioned certificate shall be filed with the Clerk of this Court within that time.

( ) The motion of _____ for a further stay of the issuance of the mandate is GRANTED to and including _____, under the same conditions as set forth in the preceding paragraph.

( ) IT IS ORDERED that the motion of _____ for a further stay of the issuance of the mandate is DENIED.

/s/ Joel F. Dubina
UNITED STATES CIRCUIT JUDGE

No. 93-2095

IN THE

Supreme Court of the United States

October Term, 1994

PANAMA CITY MEDICAL DIAGNOSTICS, LTD., DR. FRANK SYFRETT and DR. STEVE TAYLOR,
Petitioners,

v.

GEORGE STUART, in his official capacity as Secretary of Florida Department of Professional Regulation; DOUGLAS COOK, in his official capacity as Director of the Agency for Health Care Administration; and CITIZENS OF THE STATE OF FLORIDA,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the opinion of the Eleventh Circuit Court of Appeals in *Panama City Medical Diagnostics, Ltd., v. Williams*, 13 F.3d 1541 (11th Cir. 1994), is in conflict with the decision of this Court issued in *Nordlinger v. Hahn*, 505 U.S. ___, 112 S.Ct. 2326, 120 L.Ed.2d 1 (1992), even though the opinion issued in *Panama City Medical Diagnostics, Ltd.*, favorably cites *Nordlinger*, and does not expressly or impliedly suggest that *Nordlinger* is no longer good law?

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CONSTITUTIONAL PROVISION INVOLVED

Article XIV of the United States Constitution provides, in material part:

> ...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;...nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On April 8, 1992, Chapter 92-178, Laws of Florida, became law. This legislation represents one of the more recent efforts of the Florida Legislature over the past two decades, to contain the cost of health care in Florida. *Panama City Medical Diagnostics, Ltd., v. Williams,* 13 F.3d 1541, 1543 (11th Cir. 1994).

In June, 1992, Panama City Medical Diagnostics, Ltd., Dr. Frank Syfrett and Dr. Steve Taylor, Petitioners in the instant proceedings, filed a complaint in the United States District Court for the Northern District of Florida naming various Florida state officials, challenging the constitutionality of Chapter 92-178, Laws of Florida (the Act), and more specifically, Section 16 of that Act (Section 16). *Id.,* at 1544.

Petitioners/Plaintiffs also filed a motion for preliminary injunction before the district court, seeking an order enjoining the enforcement of Section 16, of Chapter 92-178, Laws of Florida. The text of Section 16 is set forth in Petitioners' petition for writ of certiorari. (Pet., p. 3) Basically, Section 16 imposes a fee cap on those charges which may be imposed for designated health care services (i.e., providers of physical therapy, comprehensive rehabilitation therapy, diagnostic imaging, clinical laboratory, and radiation therapy services). Expressly exempted from the fee cap are hospitals and group practices. [Section 16, Chapter 92-178, Laws of Florida, and Section 7(3)(d), Chapter 92-178, Laws of Florida]. By their motion, Plaintiffs asserted that the exemptions to Section 16 lacked a rational basis, and, therefore, violated the Equal Protection Clause of the United States Constitution. *Panama City Medical Diagnostics, Ltd.,* 13 F.3d, 1544.

It should be noted that, Petitioners when describing the legislative intent for Chapter 92-178, Laws of Florida, focus

on "self-referral" concerns. (Pet., pg. 12) However, Petitioners ignore the Legislature's statement, which may be found in Section 7(2), Chapter 92-178, Laws of Florida, that this legislation was intended to, among other things, protect citizens of Florida from unnecessary and costly health care expenditures. § 7(2) Chapter 92-178, Laws of Florida. A review of Chapter 92-178, Laws of Florida, and other related legislation which was passed in this same session (Chapter 92-33, Laws of Florida) reflects that the Florida Legislature was concerned with burgeoning health care costs in Florida, and sought mechanisms and means to control those costs. Section 16, on its face, is such a measure.

A hearing was held on the motion for preliminary injunction, and it was agreed by the parties that the hearing would be final on the equal protection issue. *Id.,* 1544. The only issue presented at that hearing was whether or not the group practice and hospital exemptions violated the Equal Protection Clause of the United States Constitution. Although other issues relating to the constitutionality of Chapter 92-178, Laws of Florida, were raised by the plaintiffs' complaint, these issues were neither addressed by the motion for preliminary injunction nor tried by the District Court to date. (R, Vol. 1, Doc. #1 and 3)

During the course of the hearing before the district court, the Defendants (Respondents herein) presented evidence that the involvement of group practices in diagnostic imaging (the designated health care service provided by the Plaintiffs who were before the District Court) was insignificant. (R, Vol. 6, Doc. #79, pg. 184) Defendants argued that the Legislature conceivably could have believed that exemption of group practices was appropriate, because by and large, the evidence before the Legislature suggested that group practices were not significantly involved in the more expensive (and costly) forms of diagnostic imaging. (R, Vol. 6, Doc. #79, pg. 245) Defendants further argued that the

Legislature might have assumed that group practices, as evidenced by their insignificant involvement in this area, would not be likely to purchase expensive diagnostic imaging equipment. (R, Vol. 6, Doc. #79, pg. 246)

Defendants presented evidence to the District Court that the cost and utilization of designated health care services in Florida, was higher than the national average. *Panama City Medical Diagnostics, Ltd.*, 13 F.3d, at 1543.

Finally, Defendants presented argument to the District Court below that the Florida Legislature could conceivably have believed that, to the extent that an exemption exists for group practices but not for sole practitioners who provide designated health care services, group practices would have a larger patient base from which to recoup the costs of purchasing expensive diagnostic imaging equipment, and, therefore, would be less likely to refer their patients for unnecessary procedures in order to recoup their investments. (R, Vol. 6, Doc. #79, pp. 239-246)

At the conclusion of the hearing on the motion for preliminary injunction, the district court orally announced its intention to grant the motion, and stated:

> ... — in this case, defendants have not convinced this court that there is any rational basis for imposing fee caps on services provided by some entities but not on other competing entities. You know whereof I speak, and our focus for the last eight hours has been on the group practice. And I — I do not, and have not heard, and I do not find that there is any rational basis for imposing these fee caps on some of the medical profession, but not all, or some of the physicians, but not all...

(R, Vol. 6, Doc. #79, pp. 261)

Thereafter, the District Court issued a written order on the motion. The court noted that Section 16 was passed with little discussion. (J.A.-3) The court further stated that:

> In order to decide whether it was rational to exempt group practices and hospitals from the reach of section 16 it must first be determined what objective the legislature had in mind when it enacted the fee cap legislation. Unfortunately, the legislature's cursory treatment of section 16 makes it difficult to discern just what the legislature did intend when it enacted the fee cap....

(J.A.-11)

The District Court found that only three possibilities for rationales were suggested by the record in the case: (1) the fee caps were directed to abuses of joint ventures; (2) the fee cap was passed as a *quid pro quo* for an extension in divestiture dates contained elsewhere in the act; and (3) that the fee caps could have been intended to reduce the cost of designated health services without targeting self-referring physicians in particular. (J.A.-11-13) The court rejected all of these arguments. The District Court made no mention of the other rationales which were propounded by Defendants, as noted above. (J.A.-1-14)

By the order, the District Court Judge found that Section 16 violated the Equal Protection Clause of the United States Constitution, and enjoined Defendants from enforcing the provisions of section 16, Chapter 92-178, Laws of Florida, against the plaintiffs and intervenors in the action.

Defendants took an appeal of the order entered by the District Court Judge. On appeal, the Eleventh Circuit Court of Appeal reversed the order of the district court, and remanded the matter for further proceedings consistent with

the opinion of the Eleventh Circuit Court of Appeals. *Panama City Medical Diagnostics, Ltd.,* 13 F.3d, at 1547.

The Eleventh Circuit Court of Appeals noted that:

> Because legislatures are not required to articulate reasons for the enactment of a statute, "it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." Therefore, in evaluating the rational basis for a statute, it is entirely permissible to rely on rationales that were not contemplated by the legislature at the time of the statute's passage. (citations omitted, footnotes omitted)

Panama City Medical Diagnostics, Ltd., 13 F.3d, at 1546 [quoting from *Beach Communications, Inc.,* 508 U.S. ___, 124 L.Ed.2d 211, 222, 113 S.Ct. 2096, 2102 (1993)].

The Eleventh Circuit Court of Appeals further noted that the proper inquiry on equal protection review, is concerned with the *existence* of a conceivable rational basis, not whether that basis was actually considered by the legislative body. The Eleventh Circuit further noted that a state has no obligation to produce evidence to sustain the rationality of a statutory classification. *Panama City Medical Diagnostics, Ltd.,* 13 F.3d, at 1547.

The Eleventh Circuit Court of Appeals concluded that there existed a conceivable rational basis for the hospital exemption, due to the fact that Florida hospitals are already subject to cost containment measures. *Id.,* at 1547. The court further concluded that there were several rationales which existed to support the group practice exemption:

> One possible conceivable rational basis is that the legislature chose to exempt group practices because of the insignificant involvement of group

> practices in diagnostic imaging services. Another possibility is that a distinction between group practices and sole practitioners is justified by the assumption that group practices have a larger patient base from which to recoup costs of purchasing expensive diagnostic imaging equipment, and are therefore less likely to need to refer patients for unnecessary procedures to recover their investments. Finally, it is conceivable that the legislature knew the fee caps would drive out of business everyone subject to them, and thus chose to exempt a small group in order to maintain the availability of diagnostic imaging in Florida.

Id., at 1547.

Petitioners seek review of this opinion of the Eleventh Circuit Court of Appeals, by the instant petition for writ of certiorari.

In the statement of the case, Petitioners argue that the fee caps 'would probably' put them out of business. In support of this statement Petitioners cite *Panama City Medical Diagnostics, Ltd. v. Williams,* 13 F.3d 1541, 1544 (11th Cir. 1994). (Pet., pg. 4) The Eleventh Circuit Court of Appeals has only stated that the fee caps **could** put providers of designated health care services out of business. *Id.*, at 1544.

Although Petitioners' complaint filed in the District Court below alleges that the fee caps amount to a regulatory taking, this issue has not yet been litigated. Such an inquiry would require an individualized analysis into the expenses, profits and efficiency of each provider of designated health care services. It cannot now be known whether or not the effect of the fee cap would be to drive all providers out of business. However, the Florida Legislature could have reasonably assumed that the fee cap, as presently established, would drive those entities who were not efficient providers

out of business. *Panama City Medical Diagnostics, Ltd.*, at 1547. The evidence presented to the Florida Legislature established that Florida had more diagnostic imaging machines, in 1989, than the entire nation of Canada, with a population twice that of Florida, and West Germany, with a population five times that of Florida. *Panama City Medical Diagnostics, Ltd.*, at 1543.

SUMMARY OF ARGUMENT

Petitioners have failed to demonstrate that certiorari review is appropriate in this case. Petitioners do not demonstrate that, in *Panama City Medical Diagnostics, Ltd.*, the United States Court of Appeals has decided a federal question in a way that conflicts with applicable decisions of this Court, or other Courts of Appeal. Petitioners do not argue that the question presented is an important question of law which has not been settled by this Court. Instead, Petitioners seek an advisory opinion from this Court as to the impact that two recent decisions of this Court have on equal protection analysis in the area of economic regulation. Certiorari review for this purpose would appear to be inappropriate.

Therefore, the Petition for Writ of Certiorari should be denied.

ARGUMENT

I. The Lower Court's Decision, That The Group Practice Exemptions Contained In Section 16, Of Chapter 92-178, Laws Of Florida, Do Not Violate The Equal Protection Clause Of The United States Constitution, Is Consistent With Supreme Court Jurisprudence

Review on a writ of certiorari is a matter of judicial discretion. As a general rule, a petition for writ of certiorari will only be granted where there are special and important reasons therefor. In this regard, this Court has typically considered whether the decision at issue is in conflict with the decision of another court, or with this Court, or whether the decision deals with an important question of federal law

which has not been, but should be, settled by this Court. S.Ct.R. 10.

Petitioners' arguments in support of certiorari review in this case may be grouped in three categories: (1) Petitioners argue that the Eleventh Circuit Court of Appeals erroneously construed this Court's recent opinions on Equal Protection analysis as suggesting that it is improper for a trial court to search for the actual motivation of the challenge; (2) Petitioners argue that the Eleventh Circuit Court of Appeals construed the recent decisions of this Court in *Beach Communications, Inc., supra,* and *Heller v. Doe,* 509 S.Ct. ___, 125 L.Ed.2d 257, 113 S.Ct. 2637 (1993), as modifying the "straightforward equal protection analysis set forth in *Nordlinger, supra,* and thus erred; and (3) Petitioners argue that there exists no rational basis for the exemptions to Section 16. Petitioners' arguments are in error and rest on a misapprehension of this Court's opinions in the *Nordlinger, Heller,* and *Beach Communications, Inc.*, cases, and a misreading of the opinion of the Eleventh Circuit Court of Appeal in *Panama City Medical Diagnostics, Ltd., supra.*

With regard to Petitioners' arguments regarding the importance of the Legislature's actual motivation (Pet., pp. 5-6), Petitioners challenge the conclusion of the Eleventh Circuit Court of Appeals that it was error for the district court to search for the actual motive for Section 16. Petitioners essentially argue that none of this Court's jurisprudence on this issue "in any way suggests that it is improper for a trial court to search for the actual motivation of the challenged statute." (Pet. pg. 6) On this issue, Petitioners are clearly wrong.

In *Beach Communications, Inc.,* this Court stated:

> ...Moreover, because we never require a legislature to articulate its reasons for enacting a statute, *it is entirely irrelevant for constitutional*

> *purposes whether the conceived reason for the challenged distinction actually motivated the legislature. United States Railroad Retirement Bd. v. Fritz,* [449 U.S. 166, 179, 66 L.Ed.2d 368, 378, 101 S.Ct. 453, 461 (1960)]. (emphasis supplied)

Beach Communications, Inc., 508 U.S., ___, 124 L.Ed.2d, at 222, 113 S.Ct., at 2096.

In *Beach Communications, Inc.,* this Court restated a principle which has long been part of this Court's jurisprudence. *See U.S. Railroad Retirement Bd.,* 449 U.S., at 179, 66 L.Ed.2d, at 378, 101 S.Ct., at 461. This Court has consistently taken the position that what actually motivated a legislature to act is irrelevant to any rational basis analysis. *See also Flemming v. Nestor,* 363 S.Ct. 603, 612, 4 L.Ed.2d 1435, 80 S.Ct. 1367 (1960).

In *Panama City Medical Diagnostics, Ltd.,* 13 F.3d, at 1546-1547, the Eleventh Circuit Court of Appeals simply reiterated these existing principles which have been established by this Court. A review of the opinion of this Court in *Nordlinger, supra,* does not suggest that a different conclusion is appropriate. Nowhere in *Nordlinger* does this Court state that actual motives behind Legislation are relevant. Therefore, on the issue of the relevancy of actual motive, there is no conflict between the decision issued by the Eleventh Circuit in *Panama City Medical Diagnostics,* and this Court's jurisprudence on this issue.

It is clear that the District Court did confine its equal protection analysis to actual motivation of the Florida Legislature in passing Section 16, even though Petitioners have suggested that the court looked beyond "actual motivation." (Pet., pp. 10-15) The District Court, in its written order on the issue, stated that to determine whether there was a rational basis for the exemption, it was necessary to

determine "what objective the legislature had in mind when it enacted the fee cap legislation." (J.A.-11)

With regard to Petitioners' second argument, Petitioners argue that the Eleventh Circuit erroneously construed the opinions of this Court in *Beach Communications, Inc.*, and *Heller* as modifying the "straightforward equal protection analysis" set forth in *Nordlinger.* (Pet., pg. 9) Petitioners are in error. Nowhere in *Panama City Medical Diagnostics, Ltd.*, does the Eleventh Circuit Court of Appeals suggest that the Equal Protection Analysis in *Nordlinger* has been modified.

At issue is whether or not the *Beach Communications, Inc.*, and *Heller* decisions impact upon the following statement which may be found in *Nordlinger:* "Nevertheless, this Court's review does require that a purpose may conceivably *or* 'may reasonably have been the purpose and policy' of the relevant governmental decisionmaker." *Nordlinger,* 508 U.S., at ___, 112 S.Ct., at 2332, 120 L.Ed.2d, at 16 (emphasis supplied).

In the opinion issued in *Panama City Medical Diagnostics, Ltd.*, the Eleventh Circuit Court of Appeals does not suggest that this Court has retreated from this statement made in *Nordlinger.* Instead, the Eleventh Circuit noted:

> "The district court erred both in searching for the actual motivation of the legislation, and in confining its analysis to the facts on the record. This focus was in error because, as noted above, whether the hypothetical rational actually motivated the legislature is *irrelevant. The proper inquiry is concerned with the existence of a conceivable basis, not whether that basis was actually considered by the legislative body.*" (emphasis supplied)

Panama City Medical Diagnostics, Ltd., at 1546.

Consistent with *Nordlinger, Beach Communications, Inc.*, and *Heller,* the Eleventh Circuit Court of Appeals appropriately stated that the standard for Equal Protection Analysis in this case was whether there was a conceivable basis for the statute. *Panama City Medical Diagnostics, Ltd.*, at 1547.

The key issue in the case below was not the appropriate standard for equal protection analysis, but rather whether Petitioners sustained their weighty burden of proof in the case below. As noted by the Eleventh Circuit Court of Appeals, "a state 'has no obligation to produce evidence to sustain the rationality of a statutory classification.'" *Id.*, at 1547 (quoting *Heller,* 509 U.S., at ___, 113 S.Ct., at 2643, 235 L.Ed.2d, at 271). The Eleventh Circuit Court of Appeals also noted: "Rather the burden is on the challenger to disprove every conceivable basis which might support the classification, 'whether or not the basis has a foundation in the record.'" *Id.*, at 1547 (quoting *Heller,* 509 U.S., at ___, 113 S.Ct., at 2643, 125 L.Ed.2d, at 271).

The Eleventh Circuit Court of Appeals also noted that:

> ...In regulating economic entities, legislatures are forced to draw distinctions between those that will fall under the regulations, and those that will not. "This necessity renders the precise coordinates of the resulting legislative judgment virtually unreviewable, since the legislature must be allowed leeway to approach a perceived problem incrementally." *Beach Communications,* ___ U.S. at ___, 113 S.Ct. at 2102.

Id., at 1546.

The opinion of the Eleventh Circuit Court of Appeals in *Panama City Medical Diagnostics, Ltd.*, is completely

consistent with this Court's jurisprudence on Equal Protection analysis.

As a third argument in favor of certiorari review, Petitioners have also argued that there exists no rational basis to support Section 16. (Pet., pp. 10-15) In response, Respondents assert that Petitioners failed to meet their burden of proof below to "negative every conceivable basis for the statute." *Heller, supra.*

In the case below, the district court impermissibly shifted the burden of proof from Plaintiffs to Defendants. The court stated that "defendants have not convinced this court that there is any rational basis for imposing fee caps on services provided by some entities but not on other competing entities." (R, Vol. 6, Doc. #79, pp. 261)

Such a statement is inconsistent with both *Heller* and its predecessors. As noted above, in *Heller* this Court stated that "[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it," and the state has "no obligation to produce evidence to sustain the rationality of a statutory classification." *Id.,* 509 U.S., at ___, 113 S.Ct., at 2643, 125 L.Ed.2d, at 271.

This "burden of proof" is not new or novel. *See e.g. Vance v. Bradley, supra,* 440 U.S. 93, 111, 99 S.Ct. 949, 59 L.Ed.2d 171 (1979); and *Lehnhausen v. Lake Shore Auto Parts Co.,* 410 U.S. 356, 364, 93 S.Ct. 1001, 1006, 35 L.Ed.2d 351 (1973). Further, *Nordlinger* is silent as to "burden of proof" issues. Therefore, Petitioners cannot demonstrate any conflict on this issue between the opinion of the Eleventh Circuit Court of Appeals, and this Court's opinion in *Nordlinger.*

In the instant case, the District Court erred by requiring that Defendants demonstrate that a conceivable rational

basis existed for the statute, rather than requiring Plaintiffs to "negative the existence of any conceivable basis." *Heller,* 509 U.S., at ___, 113 S.Ct., at 2643, 125 L.Ed.2d, at 271. Furthermore, Petitioners failed to negative every conceivable basis for the statute. That it why the decision of the Eleventh Circuit Court of Appeals was unfavorable to Petitioners.

Additionally, it should be noted that Petitioners make misstatements regarding the evidence or argument submitted to the District Court. For example, Petitioners assert that the conclusion of the Eleventh Circuit Court of Appeals, that one possible rational for the fee cap provision might be the insignificant involvement of group practices, was "pure speculation made for the first time on appeal by the Eleventh Circuit,..." (J.A.-11-12) As noted previously, evidence was presented to the District Court that the involvement of group practices in diagnostic imaging was insignificant, and argument was presented that this might have been one reason for the exemption. (R, Vol. 6, Doc. #79, pg. 184, and 245-246)

Petitioners argue that this basis is not rational. Again, Petitioners are in error. First of all, it should be noted that one of the objectives of the Florida Legislature in passing Section 16, of Chapter 92-178, Laws of Florida, was to control health care costs. 7(2), Chapter 92-178, Laws of Florida. Petitioners have ignored this objective in describing the sole purpose of the act as being a desire to "minimize patient self-referral."

Second, it is well established that the Legislature must be allowed leeway to approach a perceived problem incrementally. *Panama City Medical Diagnostics, Ltd.,* 13 F.3d, at 1546. (quoting *Beach Communications, Inc.,* 508 U.S., at ___, 113 S.Ct., at 2102, 124 L.Ed.2d, at 223). *See also Williamson v. Lee Optical of Okla., Inc.,* 348 U.S. 483, 489,

75 S.Ct. 461, 465, 99 L.Ed. 563 (1955). In the instant case, evidence was presented that group practices were not significantly involved in the area of diagnostic imaging. (see citations above) Absent a perceived problem in that area, the Legislature was free to address the single area before it: designated health care services, excluding hospitals and group practices. The Legislature had no data before it from which it could conclude that there was a problem in either of the two exempted areas.

Although Petitioners assert, as noted above, that the district court went beyond the facts developed in the record below in determining whether the exemptions were rationally based, a review of the record will not support this proposition. Further, Petitioners' own statements contradict this view. Petitioners state that the second purported rational basis for the fee cap provision, that "a distinction between group practices and solo practitioners is justified by the assumption that group practices have a larger patient base from which to recoup the cost of purchasing expensive diagnostic imaging equipment, and are therefore less likely to need to refer patients for unnecessary procedures to recover their investment", is "pure fantasy." (Pet., pp. 12-13) However, in evaluating whether a rational basis exists to support a statute, the court is empowered to "hypothesize" or "speculate" about the objective of the statute. *Malmed v. Thornburgh,* 621 F.2d 565, 569 (3rd Cir. 1980), *cert. denied,* 449 U.S. 955 (1980). A legislative choice is not subject to courtroom fact-finding and may be based on "rational speculation unsupported by evidence or empirical data." *Beach Communications, Inc.,* 508 U.S., at ___, 113 S.Ct., at 2643, 124 L.Ed.2d, at 222. *See also, Vance v. Bradley,* 440 U.S., at 111, 99 S.Ct., at 950, 59 L.Ed.2d 171.

Petitioners have not disproven or negated either the first, second or third basis which was propounded by the Eleventh Circuit Court of Appeals in support of the fee cap statute.

It is for this reason that the Eleventh Circuit Court of Appeals reversed the decision of the District Court. No conflict between the opinion in *Panama City Medical Diagnostics, Ltd.*, and the jurisprudence of this Court, and the decisions of other Courts of Appeal can be demonstrated. Therefore, Certiorari review should be denied.

II. The Petition For Writ Of Certiorari Should Be dismissed Or, In he Alternative, The Decision Below Affirmed Because This Appeal Presents No Substantial Federal Question.

Petitioners do not assert that the issues decided by the Eleventh Circuit Court of Appeal in *Panama City Medical Diagnostics, Ltd.*, are important federal questions which have not been resolved by this Court. This would be difficult to argue in view of the *Heller* and *Beach Communications, Inc.*, cases decided in the 1993 term of this Court. Accordingly, Certiorari review should be denied.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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